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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID NORKIN

Plaintiff, Civil Action No. 05 Civ. 9137(DC)

-against-

DLA PIPER RUDNICK GRAY CARY LLP,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

This case involves allegations of legal malpractice and breach of fiduciary duty. The defendant is the law firm of DLA Piper Rudnick Gray Cary LLP ("Piper"). The plaintiff is David Norkin ("Norkin"), a bankrupt debtor (see Complaint, ¶ 15; id., ¶ 17) who is the former president of a bankrupt corporation, Britestarr Homes, Inc. ("Britestarr"). Id., ¶ 20. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334, because the case arises in or is related to Norkin's personal bankruptcy and Britestarr's bankruptcy. See Grausz v. Englander, 321 F.2d 467, 471-72 (4th Cir. 2003).

Piper has moved to dismiss the complaint or for summary judgment in its favor. For the following reasons, the Court should grant the motion and bring this case to an end.

2981-002170302

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I. NORKIN'S ALLEGATIONS

A. Norkin's Factual Allegations[1]

Norkin alleges that from 1983 until 2002 he was Britestarr's president and "sole beneficial owner." Complaint, ¶ 1. Nonetheless, he also alleges that, at some undisclosed point "after Britestarr's formation," record ownership of the Britestarr shares "was transferred" to his wife, Friema. Id., ¶ 14. The transfer of the shares created the conditions for a subsequent "ownership dispute" (see id., ¶¶ 14-18; id., ¶ 29(b)), which plays a prominent role in the complaint and in the claim for damages.

The "ownership dispute" began to take shape in 1988, when Britestarr bought approximately 28 acres of industrial land in the Bronx (id., ¶ 3), using a loan from Lloyds Bank. See id., ¶ 14. As a condition of that loan, Lloyds Bank required Friema Norkin to pledge the Britestarr shares. She did, delivering the actual certificates to the bank. Id.

At some point thereafter, Norkin and his wife obtained a divorce. Id. In connection with the divorce, Norkin's wife transferred her interest in the Britestarr shares to Norkin. Id. But although Lloyds Bank received notice of both the divorce and the transfer in 1990, it continued to retain the original stock certificates. Id. Hence, although Norkin claimed to have recovered his controlling interest in Britestarr, the actual stock certificates remained out of his possession and in his ex-wife's name. See id.

Some eight years later, on December 31, 1998, Britestarr granted ABB Equity Ventures ("ABB"), a power plant developer, an option to purchase its site. Id., ¶¶ 4-6. If ABB exercised the option, Britestarr could elect to receive a purchase price of $31.4 million or it could take an equity interest in the power plant that ABB considered building on the site. Id., ¶ 7. Shortly thereafter, Norkin alleges, he retained Piper to assist "him and Britestarr" in "advancing the transaction with ABB." Id., ¶ 8.

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[1] Piper disputes many of Norkin's allegations and will refute them should the case proceed past preliminary motions. Nonetheless, solely to the extent that Piper has moved to dismiss the complaint for failure to state a claim upon which relief can be granted, it assumes the truth of the well-pleaded factual allegations in the complaint. Fed. R. Civ. P. 12(b)(6).

In the meantime, Norkin alleges that Britestarr had "defaulted on the Lloyds loan." Id., ¶ 15. Norkin, however, does not allege that Lloyds Bank took any action to enforce its rights.[2]

Instead, he alleges that in 2001 ABB, for some undisclosed reason, "stepped into the shoes of Lloyds by purchasing Lloyds' rights against Britestarr, including Lloyds' rights (if any) to the Britestarr shares pursuant to [his ex-wife's] pledge" of the Britestarr shares. Id. ABB then "commenced a lawsuit in Norkin's personal bankruptcy proceedings[,][3] contending that Friema Norkin was the rightful owner of the Britestarr stock shares." Id. In this way, the "ownership dispute" came to a head.

Norkin proceeds to allege that Piper advised him "in his personal capacity as to the ownership of the shares." Id., ¶ 16. Norkin also alleges that in the spring of 2002 ABB informed Piper of an offer to extend the option agreement for 18 to 20 months and to pay $1 million in additional option payments. Id., ¶ 17. Norkin claims that the alleged offer "would have enabled

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[2] The Court can take judicial notice that Lloyds Bank brought suit against Norkin and his wife in about 1993, but that this Court dismissed the complaint for lack of complete diversity between the bank, which is a British corporation, and Mrs. Norkin, who was a British subject. See Lloyds Bank PLC v. Norkin, 817 F. Supp. 414 (S.D.N.Y. 1993).

[3] The Court can take judicial notice that, between March and December of 2001, ABB or an ABB subsidiary actually brought no fewer than three lawsuits against Norkin or Britestarr: Oak Point Property, Inc. v. Norkin, Adversary Proceeding No. 01 5144(AHWS), in the United States Bankruptcy Court for the District of Connecticut; Oak Point Property, Inc. v. Britestarr Homes, Inc., Index No. 28224/2001, in the Supreme Court of the State of New York for Bronx County; and ABB Equity Ventures, Inc. v. Britestarr Homes, Inc., Index No. 60/230/01, in the Supreme Court of the State of New York for New York County. Piper did not represent Norkin or Britestarr in any of those lawsuits.

[him] to settle ABB's claim in his personal bankruptcy case over the ownership of the Britestarr shares." Id. He complains, however, that Piper failed to advise him of the alleged offer. Id., ¶ 18.

Norkin alleges that, between March and May 2002, Piper advised Britestarr to file for bankruptcy protection and that it advised him to resign as Britestarr's president. Id., ¶ 19. Norkin did in fact resign (id., ¶ 23), and Britestarr filed for bankruptcy protection. Id., ¶ 20 ("Britestarr filed bankruptcy"); see id., ¶ 22. Norkin now alleges that Piper should not have advised Britestarr to file for bankruptcy, but should instead have recommended that Britestarr accept ABB's putative offer. Id., ¶ 22.

Meanwhile, Norkin alleges that Piper had a conflict of interest, which, he says, the firm failed to disclose. Id., ¶ 24. He implies that the alleged "conflict" motivated Piper to advise Britestarr to file for bankruptcy and to advise him to resign. See id., ¶¶ 24-26.

B. Norkin's Legal Theories

Norkin's complaint contains two counts: one for breach of fiduciary duty and a second for legal malpractice.

In the first count, Norkin alleges that, as his "counsel," Piper owed him a fiduciary duty. Id., ¶ 28. He contends that the firm breached that duty because of its alleged conflict and because it failed to advise him of ABB's alleged offer. Id., ¶ 29.

In the second count, Norkin alleges that, as his "attorneys," the Piper lawyers owed him a duty "to exercise the reasonable and ordinary care of similarly situated professionals." Id., ¶ 33. He contends that the firm breached that duty by advising him to resign, by not advising him of ABB's alleged offer, and by not advising him and Britestarr to accept ABB's alleged offer. Id., ¶ 33.

In both counts, Norkin claims to have suffered compensatory damages "in excess of $10,000,000." Id., ¶ 30; id. ¶ 33. While he specifies that his damages "includ[e]" the loss of his "right to receive salary" as Britestarr's president (id., ¶ 30; id., ¶ 34), the sheer magnitude of the damage claim implies that the vast majority of his damages consists of the alleged loss of his rights as Britestarr's "sole beneficial owner." Id., ¶ 1.

Finally, Norkin claims the right to exemplary damages. Id., ¶ 31; id., ¶ 34.

II. SUMMARY OF THE ARGUMENT

Piper advances three principal grounds for its motion to dismiss or for summary judgment in its favor.

First, virtually all of Norkin's claims constitute the property of his bankruptcy estate. Those claims, however, now belong to Norkin's Chapter 7 trustee and not to Norkin himself. The Court, therefore, should dismiss those claims because Norkin lacks standing to assert them. See infra § IV(A).

Second, Norkin has already testified, under oath, that Piper represented Britestarr alone and that it did not represent him personally in any of the transactions detailed in his complaint. Therefore, because of the admitted absence of an attorney-client relationship between Norkin and Piper, he has no right to assert his claims of legal malpractice or breach of fiduciary duty. See infra § IV(B).

Finally, although Norkin charges that Piper breached its duties by allegedly failing to advise him of ABB's alleged proposal, he has already testified, under oath, that he "would have rejected" the proposal that he claims not to have seen. Therefore, because Piper could not have caused Norkin any damage by allegedly failing to inform him of a proposal that he would have "rejected" and "would never have signed," his claims of damage have no conceivable basis in fact or in law. See infra § IV(C).

III. THE APPLICABLE LEGAL STANDARDS

A. The Standards Applicable to a Motion to Dismiss

A motion to dismiss for failure to state a claim tests "the legal sufficiency of the complaint." See, e.g., 5B A. Miller & C. Wright, Federal Practice and Procedure § 1356, at 354 & n. 1 (3d ed. 2004), citing De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 69 (2d Cir.), cert. denied, 519 U.S. 1007 (1996). Thus, for purposes of a motion to dismiss, a court accepts the well-pleaded factual allegations of the complaint and views them in the light most favorable to the plaintiff. De Jesus, 87 F.3d at 69.

A court, however, should "'give no credence to plaintiff's conclusory allegations.'" Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002), quoting Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001). Nor need a court accept the truth of legal conclusions in the guise of factual allegations. See 5B C. Wright & A. Miller, Federal Practice and Procedure, supra, § 1357, at 521 & n. 22 (collecting authorities).

The unique function of Rule 12(b)(6) is to "authorize[] a court to dismiss a claim on the basis of a dispositive issue of law." Neitzke v. Williams, 490 U.S. 319, 326 (1989). In that way, Rule 12 "streamlines litigation by dispensing with needless discovery and factfinding." Id. at 326-27. This aspect of the rule is particularly applicable in this case, where the defendant challenges the plaintiff's legal right or standing to assert the claims in the complaint.

B. The Standards Applicable to a Motion for Summary Judgment

Rule 56(c) requires the entry of summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Powell v. Board of Med. Examiners, 364 F.3d 79, 84 (2d Cir. 2004). The Supreme Court has made it clear that summary judgment is not a "disfavored procedural shortcut" (Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987)), but a means to prevent the necessity and expense of trial in cases in which the trier of fact could not reasonably find for the plaintiff. See Knight, 804 F.2d at 12.

In moving for summary judgment, a defendant can meet its burden by pointing out the absence of evidence to support the nonmoving party's case. PepsiCo, Inc. v. Coca-Cola Co., 315 F.2d 101, 105 (2d Cir. 2002); see Celotex Corp. v. Catrett, 477 U.S. at 322 (district court should enter summary judgment against any party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial). "When the moving party meets this burden, the burden shifts to the nonmoving party to come forward with 'specific facts showing that there is a genuine issue for trial.'" Pepsico, Inc. v. Coca-Cola Co., 315 F.3d at 105, quoting Fed. R. Civ. P. 56(e).

In opposing the motion, a plaintiff must "'demonstrate more than some metaphysical doubt as to the material facts.'" Powell, 364 F.3d at 84, quoting Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). Moreover, "[i]f the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and do not suffice to defeat a motion for summary judgment." Dusé v. International Business Machines Corp., 252 F.3d 151, 158 (2d Cir. 2001), citing Celotex, 477 U.S. at 322-23; Knight, 804 F.2d at 11-12; see Powell, 364 F.3d at 84 ("[a]n alleged factual dispute regarding immaterial or minor facts between the parties will not defeat an otherwise properly supported motion for summary judgment").

Finally, "[i]f the nonmovant fails to meet this burden, summary judgment will be granted against [him]." Powell, 364 F.3d at 84, citing Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994).

IV. THE COURT SHOULD DISMISS THE COMPLAINT OR ENTER SUMMARY JUDGMENT AGAINST NORKIN

A. Norkin Has No Standing to Assert Most of the Claims in His Complaint

While Norkin studiously avoids disclosing the complete basis for his $10 million claim in damages, his complaint implies that he lost his interest in Britestarr because of Piper's alleged failure to inform him of ABB's alleged offer to resolve the "ownership dispute." See, e.g., Complaint, ¶ 3 (alleging that Norkin was Britestarr's "sole beneficial owner" until "May 2002"); id., ¶ 17 (alleging that in "spring 2002" ABB made a proposal that allegedly would have resolved the "ownership dispute"); id., ¶ 18 (alleging that Piper failed to advise Norkin of the alleged offer to resolve the "ownership dispute"). The Court should dismiss that claim, because it constitutes the property of Norkin's bankruptcy estate, over which his Chapter 7 trustee alone now has exclusive control.

When Norkin filed for bankruptcy protection, he owned, or claimed to own, the Britestarr shares. Thus by operation of law, the shares (or Norkin's interest in the shares) became the property of his bankruptcy estate. 11 U.S.C. § 541(a)(1) ("The commencement of a case . . . creates an estate," which "is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case"). Indeed, at the outset of his bankruptcy case in January 1997, Norkin himself filed a schedule in which he listed the Britestarr shares as an asset of his estate. Schreiber Decl., Ex. D.

Norkin alleges that Piper represented him while he was in personal bankruptcy. Complaint, ¶¶ 15-22. During that time, he says, Piper failed to advise him about matters pertaining to the property of his bankruptcy estate – specifically, an alleged offer to "settle ABB's claim in his personal bankruptcy over the ownership of the Britestarr shares." Id., ¶ 17. As a result, he claims to have lost his interest in that property of the estate (i.e., his interest in those shares). See, e.g., id., ¶ 29(b) (asserting that ABB's alleged "settlement proposal" "would have resolved the ownership dispute"); id., ¶ 33(b) (asserting that ABB's alleged "settlement proposal" "would have allowed Norkin to remain as Britestarr's rightful owner").

Norkin, however, no longer has the right to assert that claim. On May 22, 2002, the United States Bankruptcy Court for the District of Connecticut converted Norkin's case from a Chapter 11 case to a Chapter 7 case (Schreiber Decl., Ex. M) and appointed a Chapter 7 trustee. Id., Ex. N. As a matter of law, the trustee's appointment vested him with exclusive control over all of the property of Norkin's estate, including his claim that Piper's alleged malpractice caused him to lose part of the property of his estate. See, e.g., Bauer v. Commerce Union Bank, 859 F.2d 438, 441 (6th Cir. 1988), quoting Jefferson v. Mississippi Gulf Coast YMCA, 73 B.R. 179, 181-82 (S.D. Miss. 1986) ("'[i]t is well settled that the right to pursue causes of action formerly belonging to the debtor – a form of property under the Bankruptcy Code – vests in the trustee for the benefit of the estate'"); Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132, 136 (4th Cir. 1988) (bankrupt's claims constitute property of bankruptcy estate, over which trustee in bankruptcy has full authority); Pereira v. Dunnington (In re 47-49 Charles Street, Inc.), 211 B.R. 5, 6 (S.D.N.Y. 1997) ("[o]nce a trustee is appointed in a bankruptcy case, . . . the trustee, not the debtor or the debtor's principal, has the capacity to represent the estate and to sue and be sued"); see also Dawnwood Props./78 v. Thorson, 231 B.R. 167, 174 (S.D.N.Y. 1999) (debtor did not have standing to bring lawsuit that Chapter 11 trustee had refused to authorize); Murray v. Bd. of Educ., 248 B.R. 484, 486 (S.D.N.Y. 2000) ("Chapter 7 . . . debtors lose standing to maintain civil suits – which must be brought and/or maintained by their bankruptcy trustees") (dicta).

In short, because he is in Chapter 7 bankruptcy and because the bankruptcy court has appointed a Chapter 7 trustee, Norkin lacks standing to assert claims pertaining to the "ownership dispute." BRS Associates, L.P. v. Dansker, 246 B.R. 755, 771 (S.D.N.Y. 2000) ("[i]f the cause of action belongs to the estate, the trustee has exclusive standing to assert it"); Pereira v. Dunnington (In re 47-49 Charles Street, Inc.), 211 B.R. at 6 (only the trustee "has the capacity to represent the estate and to sue and be sued"); see also Mitchell Excavators, Inc. by Mitchell v. Mitchell, 734 F.2d 129, 131 (2d Cir. 1984) (the rights created by the commencement of the bankruptcy proceeding are "normally vindicated by the trustee"); 11 U.S.C. § 323 (the trustee "is the representative of the estate" and "has capacity to sue or be sued").

It makes no difference that Norkin complains only of acts or omissions that occurred after the filing of his bankruptcy petition: because he alleges that Piper damaged or destroyed the property of his estate, that claim belongs to his estate, and his trustee alone may assert it. See, e.g., O'Dowd v. Trueger (In re O'Dowd), 233 F.3d 197, 203-04 (3d Cir. 2000) (property of the estate included claim for post-petition legal malpractice that allegedly reduced value of property of estate); Brodksy v. Cohen (In re Dr. Stephen W. Grosse, P.C.), 44 B.R. 200, 202 (Bankr. E.D. Pa. 1984) (claim for post-petition conversion of estate property constituted property of the estate); see also 11 U.S.C. § 541(a)(7) (the debtor's estate includes "[a]ny interest in property that the estate acquires after the commencement of the case"); Segal v. Rochelle, 382 U.S. 375, 380 (1966) (when after-acquired property "is rooted in the pre-bankruptcy past and is so entangled with the bankrupt's ability to make an unencumbered fresh start," it "should be" property of the estate).

The Third Circuit's O'Dowd decision demonstrates why Norkin's claims belong to his estate. In O'Dowd the debtor had hired bankruptcy attorneys to pursue a claim against another attorney whose prepetition malpractice, she said, had led her to file for bankruptcy. O'Dowd, 233 F.3d at 199-200. That prepetition claim unquestionably belonged to the debtor's estate. Id. at 204; 11 U.S.C. § 541(a)(1). Later, however, the debtor proceeded to allege additional malpractice on the part of the bankruptcy lawyers who pursued the malpractice case against the first lawyer. O'Dowd, 233 F.3d at 200. Thus the O'Dowd case required the court to decide whether the malpractice claim against the bankruptcy lawyers belonged to the estate or to the debtor herself.

Even though the debtor had not even engaged the bankruptcy lawyers until after the filing of the bankruptcy petition (id. at 200), and even though the claims against them did not accrue until four years after the filing of the petition (see id. at 203), the court held that the claims belonged to the debtor's estate, not to the debtor herself. Id. at 204. In reaching its decision, the court reasoned the bankruptcy lawyers' alleged misconduct "reduced the value" of the malpractice lawsuit against the previous lawyer (id. at 203), which itself belonged to the bankruptcy estate. Id. at 204. For that reason, the court found it "conceptually impossible to sever" the action against the bankruptcy lawyers from the underlying action against the previous lawyer. Id. "Moreover," the court added, the post-petition claims against the bankruptcy lawyers were "traceable directly" to the debtor's "pre-bankruptcy dealings" with the previous lawyer. Id. at 203-04.

The court also reasoned that a post-petition malpractice claim belongs to the debtor only if "the debtor is personally injured by the alleged malpractice, while the estate is concomitantly not affected." Id. at 204. In O'Dowd, however, the bankruptcy lawyers' malpractice affected the estate alone, because their malpractice "would have reduced the value" of the underlying malpractice claim, "which was property of the estate." Id. Consequently, the court concluded that the estate was the "injured party" (id.) and that the claim against the bankruptcy lawyers belonged to the estate and to the debtor's trustee, and not to the debtor herself. Id.

The same principles should lead to the dismissal of Norkin's complaint insofar as it concerns the loss of his interest in the Britestarr shares. While Norkin complains of post-petition conduct by lawyers who allegedly represented him in connection with his bankruptcy, the alleged damage affected his claim to the shares, which were the property of his estate. Therefore, to the extent that Norkin faults Piper for allegedly causing him to lose the property of his estate (i.e., the shares or his interest in them), the claim constitutes the property of his estate, which his trustee alone may now assert. O'Dowd, 233 F.3d at 203-04. The Court, accordingly, should dismiss the complaint for lack of standing.[4]

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[4] Norkin repeatedly states that his damages include the salary that he would allegedly have received from Britestarr had he accepted ABB's alleged proposal. See, e.g., Complaint, ¶ 23; id., ¶ 30; id., ¶ 34. Piper agrees that future payments would not constitute the property of estate, provided that they truly represented salary, as opposed to dividends or other fruits of Norkin's beneficial interest in the company. Matter of Clark, 891 F.2d 111, 115 n. 5 (5th Cir. 1989), quoting Matter of Hellums, 772 F.2d 379, 381 (7th Cir.1985) ("'[p]ost-petition wages are not property of the estate of a Chapter 7 bankrupt"); Continental Illinois Nat'l Bank and Trust Co. v. Bernard (In re Bernard), 99 B.R. 563, 569 (Bankr. S.D.N.Y. 1989) ("postpetition salary is not property of the debtor's estate"). Consequently, to the minor, if not trivial, extent that Norkin complains of the deprivation of future salary or similar employment benefits, Piper agrees that he has standing.

B. Norkin Admitted, Under Oath, that Piper Did Not Represent Him

All of Norkin's claims turn on his allegation that Piper represented both him and Britestarr in their dealings with ABB. Yet in litigation concerning Britestarr's bankruptcy,[5] Norkin has already testified that Piper did not represent him personally. His testimony demonstrates the absence of any factual basis for his claims.

Norkin's deposition took place on October 27 and October 28, 2004. Schreiber Decl., Ex. A. At the deposition, he was represented by his personal bankruptcy counsel, and Britestarr's counsel took an active role in defending him. Id. Indeed, just before the deposition, Norkin and his lawyers had entered into an unusual "joint prosecution agreement" in which Britestarr's counsel agreed to finance this case in exchange for a cut of any recovery. See Schreiber Decl., Ex. O.[6]

At the deposition, Piper's counsel asked Norkin the open-ended question, "Who did Piper represent?" In response, Norkin did not claim that Piper represented him; rather he said, without hesitation, "Britestarr Homes." Id., Ex. A [Norkin Depo.] at 149.

Immediately thereafter, Norkin added that a Piper lawyer represented him and his wife in connection with a small estate-planning matter. Id. ("[t]heir late partner, a very nice man died, he

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5 That litigation is captioned as Britestarr Homes, Inc. v. Piper Rudnick LLP, Civil Action No. 3:05-cv-796-SRU, in the United States District Court for the District of Connecticut. Piper's motion for summary judgment is currently pending before the court; no trial date has been set.

6 In the "joint prosecution agreement," Norkin promised to "assist" Britestarr and its counsel in prosecuting claims against Piper. Id., ¶ 1(b). In exchange, Britestarr's counsel agreed to pay Norkin's lawyers a $10,000 advance and an additional $3000 per month through the conclusion of this case. Id., ¶ 2(b). Britestarr's counsel also agreed to give Norkin 15 percent of whatever Britestarr's alleged shareholder might recover in Britestarr's case against Piper. Id.; see also id., ¶ 1(c). At the same time, Norkin agreed to give Britestarr's counsel 20 percent of his recovery in this case and to repay the sums that Britestarr's counsel has advanced toward his attorneys' fees. Id., ¶ 1(a).

made a will for us[,] which is paid for"). Then, however, he confirmed that Piper never represented him, individually, in any matter other than the drafting of his will:

> Q. Is that the only matters [sic] that anybody at Piper did for you individually, the only matter that was opened up for you individually?
>
> A. That's it.

Id. at 149.[7]

Norkin's testimony comports with the documentary record. He can point to no retention agreement in which Piper undertook to represent him (as opposed to Britestarr) in the matters detailed in his complaint. Nor can he point to any documents reflecting any legal fees that he paid to Piper in any of those matters. To the contrary, the uncontradicted facts demonstrate that Piper agreed to represent Britestarr and only Britestarr. Id., Ex. E; id., Ex. L.

In this case Norkin cannot escape the consequences of past testimony. He has admitted, under oath, that Piper represented Britestarr alone and that the firm did not represent him personally in any of the transactions detailed in his complaint. Yet, without an attorney-client relationship, Norkin has no basis to pursue his claims of breach of fiduciary duty (Tal v. Superior Vending, LLC, 799 N.Y.S.2d 532, 533 (N.Y. App. Div. 2005)) or of legal malpractice. See, e.g., Weiss v. Manfredi, 639 N.E.2d 1122, 1124 (N.Y. 1994) (affirming dismissal because of absence of privity of contract with defendant attorneys); Ahmed v. Trupin, 809 F. Supp. 1100, 1106 (S.D.N.Y. 1993), citing Crossland Sav. FSB v. Rockwood Ins. Co., 700 F. Supp. 1274, 1280 (S.D.N.Y. 1988) ("[t]he law is settled in New York that an attorney may not ordinarily be held liable in negligence toward third parties with whom he is not in a relationship of privity"); see also Griffin v. Anslow, 793 N.Y.S.2d 615, 617 (N.Y. App. Div. 2005) ("an attorney will not be liable to a nonclient for acts of malpractice absent fraud, collusion, or a malicious or tortious act"); Berkowitz v. Fischbein, Badillo, Wagner & Harding, 777 N.Y.S.2d 99, 101 (N.Y. App. Div. 2004) ("a law firm has no duty to a third party not in privity . . . for harm caused by professional negligence or malpractice, unless it is alleged that the firm committed acts constituting fraud, collusion, malicious acts or other special circumstances").[8]

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[7] After Norkin had completed his answer, Britestarr's attorney purported to object on the ground that the question "call[ed] for a legal conclusion." Id. at 150. The objection was both untimely and unmeritorious, as the question plainly called only for Norkin's knowledge or understanding of the facts as to what Piper "did for" him individually or what "matters" Piper had "opened up" for him individually.

Norkin cannot create a genuine dispute of material fact by recanting his testimony and disputing what he previously swore was true. Bickerstaff v. Vassar College, 196 F.3d 435, 455 (2d Cir. 1999); Miller v. ITT Corp., 755 F.2d 20, 23 (2d Cir. 1985), citing Perma Research and Devo. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969). In view, therefore, of his prior sworn testimony that Piper did not represent him on the matters alleged in his complaint, the Court should enter summary judgment against him.

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[8] As a matter of law, Piper did not represent Norkin merely because it represented the corporation of which Norkin was an officer and an alleged shareholder. See, e.g., Griffin v. Anslow, 793 N.Y.S.2d at 618, citing Kushner v. Herman, 628 N.Y.S.2d 123 (N.Y. App. Div. 1995) ("corporate counsel is not in privity with the directors or shareholders of the corporation); Quintel Corp. N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1240 (S.D.N.Y. 1984) ("a corporate director or officer may not sue the corporation's legal counsel for malpractice"); Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1185 n. 3 (S.D.N.Y. 1979) ("[t]he fact that an attorney represents a corporation does not thereby make that attorney counsel to the individual officers and directors"); see also Talvy v. American Red Cross in Greater New York, 618 N.Y.S.2d 25, 29 (N.Y. App. Div.), aff'd, 661 N.E.2d 159 (1995), citing Evans v. Artek Sys., Corp., 715 F.2d 788, 792 (2d Cir. 1983) ("[u]nless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for the corporation represents the corporation, not its employees"); Ahmed v. Trupin, 809 F. Supp. at 1106, citing Quintel Corp. N.V. v. Citibank, N.A., 589 F. Supp. at 1240 ("[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to that entity, not to every person connected with that entity").

C. Norkin Can Prove No Damages Resulting from the Alleged Failure to Inform Him of ABB's Alleged Offer Because He Has Already Testified that He "Would Have Rejected" ABB's Alleged Offer

In addition to involving evidence about whether Piper represented Norkin, the Britestarr case also involved evidence about ABB's alleged settlement proposals. The evidence specifically showed that ABB made a series of such proposals in early 2001 – about a year before the events alleged in the complaint. See, e.g., Schreiber Decl., Ex. F; id., Ex. H; id., Ex. I.[9] But while ABB formally withdrew its last written proposal on March 13, 2001 (id., Ex. J), and while there is no evidence that ABB ever made another specific proposal, Britestarr (and now Norkin) have alleged that in the spring of 2002 ABB was subjectively willing to revive one of the proposals that Norkin (for Britestarr) had rejected a year or more earlier. That allegation cannot serve as the basis for Norkin's claims against Piper, because he has already sworn that he would "never" have accepted those proposals.

At his deposition in the Britestarr case, Norkin testified at length about ABB's prior proposals. Norkin specifically agreed that, in a handwritten note to one of Britestarr's lawyers, he had called a January 2001 proposal an "abomination" and a "joke." Id., Ex. A [Norkin Depo.] at 169-70; id., Ex. F. In reviewing it, Norkin had written "no," "no," and "out" in the margins beside the many key terms that he regarded as "unacceptable." Id., Ex. A [Norkin Depo.] at 170; id., Ex. F; see also id., Ex. A [Norkin Depo.] at 171-72. Endorsing the testimony of a Britestarr lawyer from the firm of Buchanan Ingersoll P.C., Norkin agreed that "the whole thing was a deal

[9] ABB did not address these proposals to Piper, but to Britestarr's other lawyers, Mitchell Fenton of the firm of Buchanan Ingersoll P.C. and a solo practitioner named Mark Schwarz. See, e.g., id., Ex. F; id., Ex. H; id., Ex. I.

breaker." Id. Ex. A [Norkin Depo.] at 171; see id., Ex. B [Fenton Depo.] at 103. He emphatically stated that he "would never have signed" that agreement. Id., Ex. A [Norkin Depo.] at 170.[10]

Norkin had a similarly vehement reaction to the last written proposal that ABB made. In that proposal, dated March 12, 2001, ABB reiterated many of the same terms that Norkin had already rejected. Id., Ex. I; see id., Ex. A [Norkin Depo.] at 178-79. Upon reviewing it, Norkin volunteered that "none of this would be acceptable." Id. at 179. He added that he "would have rejected" the proposal. Id. at 181. He abruptly and impatiently interrupted any questions about whether he would have accepted any specific terms in the proposal, saying, "[W]e should cut it short, this whole thing was not acceptable." Id. at 179.

In the year after ABB made those proposals, Norkin's opinion of ABB did not improve. Rather, Norkin was "furious" that ABB brought suit against Britestarr (id., Ex. A [Norkin Depo.] at 186; id., Ex. B [Fenton Depo.] at 113-15), and it "inflamed" him even more that ABB tried, unsuccessfully, to have him held in contempt in a lawsuit that ABB launched against Britestarr. Id., Ex. B [Fenton Depo.] at 114; see id., Ex. A [Norkin Depo.] at 190-91. One of Britestarr's lawyers testified that Norkin "hated" ABB (id., Ex. C [Nonnenmacher Depo.], at 146-47), and Norkin himself thought that ABB had defrauded him (id., Ex. A [Norkin Depo.], at 139) and that ABB's project manager, Steven Smith, had lied to him on many occasions. Id. at 143-44. Norkin also thought that after ABB's three-year option expired at the end of 2001, ABB no longer had any enforceable rights (id. at 195-96) and that it was simply trying to steal what it could not buy.

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[10] Consistent with his view of the proposal as a "joke,"Norkin responded to it at the time by sending ABB's project manager a handwritten note, stating: "HA; HA; Best regards to all[.]" Ex. G. At his deposition, Norkin explained, "That was short for saying FU." Ex. A [Norkin Depo.] at 170.

Id., Ex. C [Nonnenmacher Depo.] at 146-47. Thus, Norkin wanted to sue, not to settle with, ABB. Id., Ex. A [Norkin Depo.] at 199; Id., Ex. K.

On this record, no reasonable factfinder could reasonably find that Piper caused Norkin to suffer any damages by allegedly failing to inform him of a proposal that he himself said he would have "rejected" and would "never" have signed. Because Norkin, therefore, cannot prove the essential element of causation,[11] the Court should enter summary judgment against him. Powell, 364 F.3d at 84, citing Celotex Corp. v. Catrett, 477 U.S. at 323.

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11 See, e.g., Brooks v. Lewin, 800 N.Y.S.2d 695, 697 (N.Y. App. Div. 2005) (reversing the denial of summary judgment, and stating that "[t]he failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence"); Fillippo v. Russo, 744 N.Y.S.2d 500, 503 (2002) (reversing the denial of summary judgment where plaintiff "would be unable to establish that [defendants'] negligence, if any, was the proximate cause of her damages"); Hill v. Fisher & Fisher, 610 N.Y.S.2d 548, 548 (N.Y. App. Div. 1994), citing Murphy v. Stein, 549 N.Y.S.2d 53 (N.Y. App. Div. 1989) (affirming judgment in attorney's favor where plaintiff lacked proof that attorney's negligence had proximately caused any injury); Zarin v. Reid & Priest, 585 N.Y.S.2d 379, 381 (N.Y. App. Div. 1992)("plaintiff must show that but for the attorney's negligence what would have been a favorable outcome was an unfavorable outcome").

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint with prejudice and without leave to amend or enter judgment forthwith in Piper's favor.

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